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Vol. 10, No. 2
March/April 2001
$9.00

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Intellectual Ammunition

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Potshots

The Internet was supposed to be all about freedom. That is why governments want to regulate it.

THE ECONOMIST

Very few private accountants could stay out of jail listing borrowed money as a "surplus." But the borrowing from sharply rising Social Security revenues—generated by full employment—does the trick in the wild world of government accounting.

GEORGE MELLOAN

A third of the nation's CEOs can name more members of the new "Survivor" cast than they can President Bush's cabinet nominees.

ZAY N. SMITH

The American people managed to wage a war of independence, erect a radical new form of government, and weather the storms of financial panic, civil war, depression, and industrialization all without the divinely inspired vision of professional politicians. America was a country founded by political amateurs.

MARK SANFORD

Every act of protection by the state entails a loss of freedom.

ROGER SCRUTON

1999: I will read five books this year. 2000: I will finish the one I started four years ago. 2001: I will finish the comics section of the newspaper this year.

NEW YEAR'S RESOLUTIONS THROUGH THE YEARS

The Tyranny of Public Health

by Jacob Sullum

Public health used to mean keeping statistics, imposing quarantines, requiring vaccination of children, building sewer systems, inspecting restaurants, and reviewing drugs for safety.

Nowadays it means, among other things, raising cigarette taxes, banning alcohol billboards, restricting gun ownership, and forcing people to buckle their seat belts.

In the past, public health officials could argue they were protecting people from external threats: carriers of contagious diseases, fumes from the local glue factory, contaminated water, food poisoning. By contrast, the new enemies of public health come from within; the aim is to protect people from themselves rather than each other.

RISKY BEHAVIOR

Public health practitioners argue they are simply adapting to changing patterns of morbidity and mortality. But in doing so, they are treating behavior as if it were a communicable disease, which obscures some important distinctions.

Behavior cannot be transmitted to other people against their will. People do not choose to be sick, but they do choose to engage in risky behavior. Their choice means the behavior, unlike a viral or bacterial infection, has value to them. It also means they will resist attempts to control the behavior.

Public health officials tend to assume people will change their behavior once they're educated about the risks associated with it. But that is not always true. In the case of smoking, for example, self-styled defenders of public health seem genuinely puzzled by the fact that so many people persist in this plainly irrational habit. They can't imagine that people might actually be willing to live shorter lives in exchange for the pleasure cigarettes give them. They can't imagine why people would drink, eat fatty foods, refuse to wear seat belts, and otherwise behave in ways frowned upon by the public health establishment. This is not because they can't help themselves; it's because, for the sake of pleasure, utility, or convenience, they are prepared to accept the risks.

AN INVITATION TO MEDDLING

Viewing risky behavior as a contagious disease invites endless meddling. The same arguments commonly used to justify the government's efforts to discourage smoking can easily be applied to overeating, for example.

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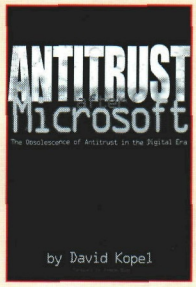

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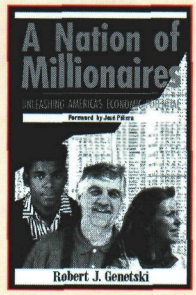

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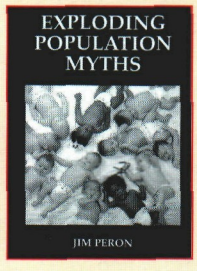

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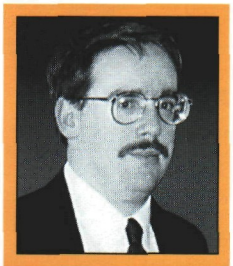

News from the Heartland

by John R. La Plante
Managing Editor

Advocates of limited government long have been concerned about judicial activism. They have worried that judges, frustrated with developments in the legislative arena, impose their own policy preferences on the public. Equally dangerous, though, is "executive activism."

One area where executive activism might be seen is in the flurry of "midnight regulations" that accompanies the end of each Presidential administration. Susan E. Dudley, our new columnist for the Regulation department, argues that while it may be coincidental that some regulations are issued at the end of an administration, some are hurried into existence without the usual checks and balances in order to appease certain interests. Sound anything like judicial activism?

Writing in the environment department, Robert H. Nelson and David W. Riggs examine the harmful effects of one specific kind of regulation: the Presidential creation of more lands devoted to wilderness status as "national monuments."

The significance of executive activism was also brought to light, indirectly, during the Senate confirmation hearings of the new Attorney General, John Ashcroft. The charge against him was that he would not enforce laws he fought as a member of the legislative branch. Perhaps this charge was hurled because his critics are well-informed in the practice of executive activism. After all, we've seen plenty of it in the last eight years.

IN THE DEPARTMENTS

Crime columnist Morgan Reynolds explores the possibilities of restorative justice, a "good intentions" proposal that just may work. In the education department, guest columnist Dr. Alan Bonsteel offers another reason for supporting school choice: Under the status quo, one of every four students drops out before high school graduation. Public schools, he reports, often have dropout rates more than ten times higher than achieved by schools of choice.

Health columnist Twila Brase warns that bureaucratization and increasing state control over the field of medicine are discouraging people from entering medical school, which could affect the quality of future physicians. Writing on law, Marni Soupcoff cites several examples of people whose property rights have been trampled by the abuse of eminent domain powers.

President Bush has made a lot of news about his plans to expand the use of the non-government sector in the delivery of social services. Writing in the privatization department, Robin Johnson tells us that governments throughout the country are relying more and more on outside vendors not so much for cost savings, but because there are some things bureaucracies just can't do very well.

Finally, Bill Ahern explains that anything other than an across-the-board tax cut will increase the progressivity of the federal income tax code, and Bartlett Cleland provides a primer on the conflict over privacy regulations.

FAREWELL

Murray Weidenbaum, former Presidential advisor, has written the Regulation department since its inception in *Intellectual Ammunition*. He has taken a sabbatical from his position at the Center for the Study of American Business, and has begged off his duties for *IA* as well. Godspeed, professor.

As always, I welcome your comments about this magazine, especially suggestions for improvement. Write to me at laplante@heartland.org.

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continued from page 1

If smoking is a compulsive disease, so is obesity. It carries substantial health risks, and people who are fat generally don't want to be. When deprived of food, they suffer cravings, depression, anxiety, and other withdrawal symptoms.

Sure enough, the headline of a March 1985 article in *Science* announced, "Obesity Declared a Disease." The article summarized a report by a panel of experts who found that "the obese are prone to a wide variety of diseases."

And it's not just the obese who need to worry. A study published in the *New England Journal of Medicine* found gaining as little as 11 to 18 pounds was associated with a higher risk of heart disease. It attributed 300,000 deaths a year to excessive weight, including one-third of cancer deaths and most deaths from cardiovascular disease. Surgeon General David Satcher called excessive weight "a major public health problem . . . that deserves much more attention than it receives."

Treating behavior as if it were a communicable disease obscures some important distinctions. Behavior cannot be transmitted to other people against their will.

What sort of attention? As early as June 1975, in its *Forward Plan for Health*, the U.S. Public Health Service was suggesting "strong regulations to control the advertisement of food products, especially those of high sugar content or little nutritional value."

Today, people like Kelly Brownell, a professor of psychology at Yale who directs the university's Center for Eating and Weight Disorders, have suggested taxing foods based on their nutritional content. Foods with a high ratio of calories to nutrients would be taxed heavily, while fruits and vegetables might be subsidized.

If this idea strikes most people as ridiculous, it's not because the plan is impractical. There's no logistical reason why people could not be required to weigh in at an approved doctor's office, say, once a year, and report the results to the Internal Revenue Service for tax assessment.

Although feasible, the fat tax is ridiculous because it's an intrusion by the state into matters that should remain private. Even if obesity is apt to shorten a person's life, most Americans would agree that's his business, not the government's.

Yet many of the same people believe not only that the government should take an interest in whether a person smokes, but that it should apply pressure to make him stop, including tobacco taxes, tax-supported nagging, and bans on smoking outside the home.

New York City lung surgeon William Cahan, a prominent critic of the tobacco industry, has explained the rationale for such policies. "People who are making decisions for themselves," he said, "don't always come up with the right answer."

A COMMON POOL OF WEALTH?

The public health establishment further argues that government intervention is justified because individual decisions about risk affect other people.

A surgeon general's report published in 1979 discussed the controversy over state laws requiring motorcyclists to wear helmets. "Motorcyclists often contend that helmet laws infringe on personal liberties," the report said. "Opponents of mandatory [helmet] laws argue that since other people usually are not endangered, the individual motorcyclist should be allowed personal responsibility for risk. But the high cost of disabling and fatal injuries, the burden on families, and the demands on medical care resources are borne by society as a whole."

This line of reasoning, which is also used to justify taxes on tobacco and alcohol, implies that all resources—including not just taxpayer-funded welfare and health care but private savings, insurance coverage, and charity—are part of a common pool owned by "society as a whole" and guarded by the government. That is a view associated with fascism and communism, not with a free society that respects private property and individual choice.

Most public health practitioners would presumably recoil at the full implications of the argument that government should override individual decisions affecting health because such decisions have an impact on "society as a whole." But former Surgeon General C. Everett Koop—who became famous as a foe of tobacco and lately has been campaigning against obesity—seems untroubled.

"I think that the government has a perfect right to influence personal behavior to the best of its ability," Koop writes.

Other defenders of the public health movement forthrightly admit its aims cannot be reconciled with the American tradition of limited government. In 1975 Dan E. Beauchamp, then an assistant professor of public health at the University of North Carolina, argued that the biggest obstacle to improving public health is "the radical individualism inherent in the market model."

"The historic dream of public health that preventable death and disability ought to be minimized is a dream of social justice," Beauchamp said. "We are far from recognizing the principle that death and disability are collective problems and that all persons are entitled to health protection." Rejecting the distinction between voluntary and involuntary hazards, he complained that "the primary duty to avert disease and injury still rests with the individual."

The same arguments commonly used to justify the government's efforts to discourage smoking can easily be applied to overeating.

Beauchamp called upon public health practitioners to challenge "the powerful sway market-justice holds over our imagination, granting fundamental freedom to all individuals to be left alone."

Public health, in other words, is inconsistent with the right to be left alone. Of all the risk factors for disease or injury, it seems, freedom is the biggest.

Jacob Sullum is senior editor of Reason *magazine and author of* For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health *(The Free Press).*

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Morgan Reynolds

Morgan Reynolds is director of the Criminal Justice Center at the National Center for Policy Analysis.

Restorative Justice, American Style

Adjectives in front of the word "justice" are suspicious things. Expressions like "social justice" or "restorative justice" smack of European socialism and gooey government programs led by woolly headed do-gooders. Justice, plain and simple, is what most people really want.

Occasionally, though, a "good intentions" program comes along that actually works, giving us something besides jails to control crime. Ed McGarrell, criminology professor at Indiana University in Bloomington, has teamed up with the Hudson Institute and the city of Indianapolis to try an experiment in restorative justice with youthful, first-time offenders. The program is based on sound principles, not wishful thinking, so it's proving successful.

FOCUSING ON VICTIMS

The three principles of restorative justice are first, restoration to the victim; second, offender accountability; and third, reintegration of the offender into the community.

The focus on victims is key, in sharp contrast to the conventional system where victims play little or no role. Once a youth is arrested, a restorative justice coordinator arranges a conference among the violator, the victim, and their respective families and supporters. A trained police officer facilitates at this conference, which gives the victim an opportunity to confront the perpetrator, explain how he or she was harmed, and ask questions of the offender. The goal is to arrive at a reparation agreement in which everyone agrees that the young offender needs to take certain actions to set things straight with both the victim and the wider community. Typical agreements include contrition, service to the victim, and community service.

"Offenders often fear setting up the conference because they'll have to appear before the eyes of someone they've harmed," says McGarrell. "In contrast to facing the cops, prosecutors, and family courts, it's hard to look good in front of the victim, her family, and your own family."

Sometimes a family member changes the dynamics of a conference dramatically. "Our mother took a second job during the summer to earn extra money to take us clothes shopping for the new school year," an older sister of one victim explained to the offender. "Here it was, the first week of school, and you stole my brother's new jacket. You'll never know how much you hurt my Mom and our family."

Indianapolis has been using restorative justice conferences since 1997. The city has allowed researchers to randomly assign eligible cases—first-time offenders age 14 and younger excluding those held for serious violent crimes—to the traditional system (the control group) or restorative justice program (the experimental group), yielding equivalent groups of youths and victims for valid comparisons.

REDUCING RE-ARRESTS

During the first two years of the experiment, the restorative justice program has met the needs of victims much better than the conventional system, as well as significantly reducing re-arrests of young offenders. About 230 youths have participated in conferences and a like number in the control group.

Over 90 percent of victims say they were satisfied with how their case was handled under restorative justice, compared to only 68 percent under the other court-ordered methods. Ninety-eight percent of victims said they would recommend restorative justice to a friend in a similar situation; only 24 percent of victims in traditional court programs would say the same.

For offenders, conferences worked better than the typical slap-on-the-wrist rendered by the juvenile system. Over 80 percent attended the conference, reached an agreement, and fulfilled all its terms, compared to only a 58 percent completion rate in the control group.

Occasionally, a "good intentions" program comes along that actually works, giving us something besides jails to control crime.

Following offenders over time, McGarrell and his team find the re-arrest rate for offenders from restorative justice conferences is little more than half that of the offenders from the control group, a dramatic and statistically significant reduction. The city has been pleased enough to expand the project to young second-time offenders.

Is it a panacea? Of course not. Victims are far more willing to cooperate in the case of youthful rather than adult offenders, and for minor property crimes where reparation is feasible. The principles of restorative justice, which resemble those of the civil justice system, apply widely though. Even if adults, probation, and incarceration are involved, contrition and repairing the damage to the victim are not ruled out.

One of the secrets to Japan's low crime and low imprisonment rate is the use of restorative justice: If the criminal expresses genuine contrition and makes amends to the victim, then the public sector can go somewhat lightly on the criminal. We can do the same here.

FOR MORE INFORMATION...

Restitution as an Objective of the Criminal Justice System. Bruce L. Benson explains the change from restitution to the current criminal justice system—and perhaps back to restitution. (*The Journal of the James Madison Institute*, Winter 2001, 6pp.)

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Education

One in Four U.S. Students Drops Out

Alan Bonsteel, M.D.

Alan Bonsteel is president of California Parents for Educational Choice.

A close look at recent data shows that school dropouts are a bigger problem than the education establishment lets on.

Census Bureau figures have been widely reported as showing more Americans than ever graduating from high school, with gradually improving dropout rates nationwide. But data from the U.S. Department of Education make it clear the U.S. high school graduation rate has fallen precipitously since 1993. One out of every four U.S. high school students drops out of school before graduation.

The U.S. high school graduation rate peaked in 1992 and 1993 at 81.2 percent, but then fell to a low of 74.7 percent in 1998, according to the November 2000 report "Dropout Rates in the United States: 1999," from the National Center for Education Statistics (NCES). Although the graduation rate recovered slightly to 76.8 percent in 1999, this still means only three of four ninth-graders ultimately received a high school diploma, an absolute tragedy in an Information Age.

U.S. high school graduation has fallen precipitously since 1993. One out of every four U.S. high school students drops out of school before graduation.

In California, ground zero for the cyber revolution, high school graduation rates are even lower, falling from 76.1 percent in the 1974-75 school year to just 68.4 percent for the 1998-99 school year.

What also peaked in 1992 at 86.4 percent was the nationwide "high school completion rate," a statistic often confused with the high school graduation rate. The high school completion rate is the total of high school graduations plus high school completion through GED or other means, which in 1992 added 5.2 percent to the high school graduation rate of 81.2. By 1998, these post-dropout completions of high school education had soared to 10.1 percent of all high school completions, masking the fall in the high school graduation rate to 74.7 percent.

Unlike the NCES data, Census information is self-reported, and thus flawed. The Census Bureau's own analysis of its methodology acknowledges it has never verified whether respondents are telling the truth.

Another method used to arrive at dropout figures, the one most commonly used by public schools, is the event dropout rate. This indicator is an attempt to count the individual dropouts from grades 10-12 as they leave school.

There are many problems with this statistic, but its greatest shortcoming is that it is not a four-year figure but a one-year figure. To understand how misleading the event dropout rate is, take a high school with four grades of 100 students each and 40 dropouts over the year. The event dropout rate is 40/400, or 10 percent. However, if all these dropouts occur in the 12th grade, the school's graduation rate is only 60 percent—an actual dropout rate four times higher than the event dropout rate.

AN ARGUMENT FOR SCHOOL CHOICE

The strongest argument for school choice is not that it provides a better education, but that it provides an education to children who otherwise would drop out and get no education at all. When parents have freely chosen a school for their child, they feel a commitment to and sense of shared purpose with that school. That commitment and sense of shared purpose are likely to keep their child in school.

Most of the reporting in the news media about the benefits of school choice has focused on test scores, where improvements have been numerically modest but statistically significant. Based on these improvements, children in the Milwaukee school choice program who spend the whole of their K-12 education in choice schools can be expected to be transformed from candidates for welfare or even prison into college freshmen.

However, only a handful of students have participated in the Milwaukee program since its inception 10 years ago, and it will be another three years before any who started as kindergartners will graduate from high school. And while the long-term improvements are likely to be dramatic, the incremental improvements in each year are small, making it easy for choice opponents to dismiss them as inconsequential.

Yet, when we compare dropout rates in schools of choice to those in America's public schools, we find the public schools have dropout rates often more than 10 times higher than those in schools of choice. Some of that dramatic difference certainly can be attributed to differences in socioeconomic status of the students, but even these differences cannot begin to explain away such a massive disparity in performance.

FOR MORE INFORMATION...

Dropout Rates 1999. Here are the most current, most reliable numbers. (National Center for Education Statistics, 40pp.)

Fax Call 312/377-3000 and request documents **#2178502** (summary, 14pp.), **#2178503** (part 1, 13pp.), **#2178504** (part 2, 13pp.)

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Environment

Wilderness Designation Stokes the Fires

Robert Nelson and David Riggs

Robert Nelson is a professor in the School of Public Affairs of the University of Maryland and senior fellow of the Competitive Enterprise Institute. David Riggs is director of land and natural resource policy at the Competitive Enterprise Institute.

In the waning days of the Clinton administration, a spate of last-minute actions included a prohibition on road building in 58 million acres of National Forests and the designation of six new national monuments.

Hailed as a plan to protect America's forests, the roadless moratorium (also known as "wilderness designations") covers 38 states and, when combined with the 35 million acres already in the official wilderness system, produces an official wilderness system approaching the size of California.

The roadless moratorium presaged Clinton's new national monument designations—a unilateral creation of six new national monuments in western states, bypassing the wishes of Congress, the states, and counties. Combined, these actions represented the last salvo in the Clinton administration's war on the rural west.

In the fall election, rural westerners completely repudiated the environmental policies of the previous administration. Al Gore received just 26 percent of the vote in Utah; 28 percent in Alaska, Idaho, and Wyoming; and 33 percent in Montana.

Environmentalists, including many in the previous administration, have exhibited a virtual religious zealotry when it comes to cleansing the environment of human—"unnatural"—influences. In fact, however, assertive human management of the forests is necessary.

More than half the National Forest system in the United States is now off-limits to the very people who live there. Without access, there is no hiking, camping, backpacking, hunting, fishing, and bird watching, and no oil or gas drilling at a time when the country faces an energy shortage.

A DANGEROUS CONDITION

Much of the buzz in Washington is about how the Bush administration will respond to the Clinton orders. Democrats and environmentalists are particularly concerned with how the new Secretary of the Interior, former Colorado Attorney General Gale A. Norton, will react. Norton likely will face serious questions about her desire to "strike a balance" between conservation and economic development on federal lands.

But amid all the political wrangling what's been overlooked is the environmental impact of prohibiting road building and logging.

Designating an additional 58 million acres of land as wilderness will not result in better National Forests. The outcome in many areas will be just the opposite: a worsening of the current crisis of forest health.

After one of the worst years of forest fires on record—over 7 million acres burned, destroying over 850 structures, and costing nearly $1 billion to suppress—the health of forests on federal lands was finally brought to the public's attention. A study issued by the Forest Service last year found over 60 percent of the National Forest and other federal lands was either very unhealthy or in deteriorating health.

A century of fire suppression has resulted in a buildup of excess wood levels in the nation's forests, creating a high risk of large, intense, unmanageable, and highly destructive forest fires. Because federal land management agencies have emphasized putting out fires as soon as they could be discovered, more wood has been left in the forest to burn, and the fire hazard continues to grow.

The forests—including the newly designated wilderness areas—will eventually burn and cause major damage to soils, watersheds, fisheries, and other ecosystem components. People and property near the National Forest tinderboxes are also at great risk. By prohibiting road building and logging, human management of the National Forests is made more difficult.

Environmentalists, including many in the previous administration, have exhibited a virtual religious zealotry when it comes to cleansing the environment of human—"unnatural"—influences. In fact, however, assertive human management of the forests is necessary.

Throughout its tenure, the Clinton administration sought to end all productive use of the National Forests, returning the land to its "natural" state. But in practice it's impossible to manage those forests in a "natural" state. For example, prior to European settlement in America's West, American Indians shaped western forests for thousands of years by deliberately setting fires. If "natural" is to be defined as preceding any human involvement, then no one can really say what the forest conditions ought to be.

With its new wilderness designations, the Clinton administration tried to draw a sharp contrast between it and the incoming Bush administration's stated objectives of utilizing National Forest resources, creating a false dichotomy between conservation and economic development. But in Clinton's style of conservation, the environment is the biggest loser.

FOR MORE INFORMATION...

The Federal Government's Poor Management of America's Land Resources. The federal government owns over one-third of all land in the U.S. Here are some ideas on how to improve management of that land. (The Heritage Foundation, May 1999, 2pp.)

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Health Care

Twila Brase

Public health nurse Twila Brase is president of Citizens' Council on Health Care.

Applications to Med School Decline

Let's not kid ourselves. Becoming a physician today requires more than altruism. It requires courage.

Caring for patients is a day-to-day battle with managed care companies. Committing an error in billing is now a federal offense. And following burdensome tomes of government regulations is all but impossible.

It should therefore come as no surprise that interest in medicine as a career may be on the decline. A study published in the September 2000 issue of the *Journal of the American Medical Association* (JAMA) finds the number of medical school applicants dropping for the third year in a row.

The number of med school applications fell by 6 percent between 1998 and 1999, 4.6 percent between 1997 and 1998, and 8.4 percent between 1996 and 1997. In 1999, 8,439 fewer students applied to medical school than in 1996.

Meanwhile, the U.S. population is increasing at almost 1 percent a year. According to the U.S. Census Bureau, nearly 7.5 million more people called America home during the same three years that over 8,400 fewer students applied to become their physicians.

> *The study does not offer an explanation for the sharp decline in medical school applications, but a shifting power base in the health care system may be reason enough.*

Although the JAMA study found the number of applicants *accepted* into medical school was virtually unchanged since 1990, the continuing decline in applicant interest combined with persistent population growth may lead to future physician shortages and subsequent admission of less-qualified applicants—a situation that would negatively affect health care quality and access for all Americans.

POWER SHIFT

The JAMA study does not offer an explanation for the sharp decline in medical school applications, but a shifting power base in the health care system may be reason enough to dissuade prospective students from joining the medical profession.

As a result of Medicare, the 1973 HMO Act, and federal tax deductions for employer-sponsored coverage, the medical bills of most Americans are now the responsibility of employers, government agencies, and health plans. As patients relinquished control of health care dollars, authority for treatment decisions moved from the medical profession to the insurance system.

Because physicians depend on health plans for payments, patients are frequently caught between the medical decisions of physicians and the judgements of health plans. Managed care contracts, treatment codes, medical necessity reviews, prior authorization approvals, and proper paperwork severely limit the physician's power to care for patients. As a result, today's physicians can be found trading precious appointment time with patients for pleading sessions with health plans.

Treating recipients of government aid is no easier, and significantly more worrisome. Federal and state health care regulations totaling 132,000 pages must be scrupulously followed because small or unintentional errors can force physicians out of practice—or into jail.

The Health Insurance Portability and Accountability Act of 1996 classified health care fraud as a new federal offense, allowing federal agents to make felony charges against physicians, assess excessive fines for infractions, and seize a physician's property. According to the American Medical Association, the fear of becoming subject to a federal investigation has caused physicians to undercode—charge less for—their services.

The decline in medical school applicants may also be attributed to 1997 changes in federal funding. Since then, Medicare has underwritten the cost of graduate medical education, the in-hospital residency training physicians receive after medical school. To cut Medicare costs, federal health officials have offered hospitals millions of dollars to decrease the number of physicians they train each year, especially medical specialists.

REGAINING POWER

To maintain the practice of medicine as a viable and attractive career, patients and physicians must regain power over health care decisions.

Key to restoring patient and physician control is patient empowerment through more direct control of health care dollars. Inexpensive, high-deductible health insurance for the rare medical catastrophes, personal or medical savings accounts for routine and minor health care expenses, and federal tax incentives that encourage individual purchase of lifelong insurance policies will allow physicians to provide care and counsel to patients without third-party interference.

Once prospective medical students see the practice of medicine redirected from insurance and regulatory requirements to the care of hurting patients, applying to medical school will no longer require an act of courage. A heart of compassion will suffice.

FOR MORE INFORMATION...

Doctors as Accountants: The Ethics of Using HMO Referral for Cost Containment. Managed care arrangements can present a conflict of interest to physicians. (Nevada Policy Research Institute, 1997, 12pp.)

Fax Call 312/377-3000 and request document **#3252401**

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Law

Marni Soupcoff

Marni Soupcoff is a staff attorney with the Institute for Justice.

New York Eminent Domain Laws Kafkaesque

It sounds like the opening of a Franz Kafka novel: You receive a letter informing you the government is condemning your property. You spring into action, assembling documents, doing research, and preparing to challenge the condemnation. But when you get to court, the judge says you are too late.

"Too late?" you protest. "But I just got this notice of condemnation yesterday!"

That's right, the judge nods. And to challenge condemnation of your property, you had to file an appeal two years ago.

"Two years ago? How was I supposed to file an appeal two years ago when the government just moved to condemn my place yesterday?"

The judge gives you a sour look as if to say, "I should have known you were one of those people who skips right by the 'legal notices' section of the newspaper."

If you had been reading the "legal notices," as dutiful citizens do, you would surely know that two years ago, the government had issued a set of "determination and findings" that it could acquire your property at some time in the future. The government did not send you these determination and findings or even tell you they existed. But they published a synopsis of them as a legal notice in the back of the newspaper.

The stakes could not be higher for Brody and Minnich and Jenkins, whose dreams of better lives will be leveled if the government's abuse of eminent domain is not restrained.

You had 30 days from the publication of the determination and findings in which to appeal them. Those magic 30 days were your only chance to dispute the condemnation proceeding in court. Never mind that you weren't notified of the determination and findings themselves, let alone that you had a time-limited right to appeal them. Never mind that the government was, at that point, years away from petitioning to acquire your property.

Because you didn't appeal a notice that appeared in the newspaper two years ago, you cannot challenge the legality of the condemnation of your property. Not now. Not when the title to your land is transferred to the government. Not ever.

NIGHTMARE IN NEW YORK

Unfortunately, this nightmarish scenario is not the opening of a Kafka novel, but an illustration of the real-life procedure by which municipalities and government agencies acquire private property against the will of property owners in the state of New York.

Just ask Bill Brody, who four years ago purchased and renovated four buildings in Port Chester. Brody's property is now being condemned by the Village of Port Chester, which plans to transfer the property to a private developer for use as part of a convenience store and parking lot.

When Brody received the Village's petition to acquire his property against his will, he did the logical thing: He consulted a lawyer and filed court papers defending himself against the taking. However, because New York's eminent domain procedure law is anything but logical, Brody was too late.

His right to challenge the legality of the condemnation of his property, to argue that taking his buildings to make way for the store was not a public purpose, had actually expired approximately 10 months before the Village filed its petition. Brody never saw the notice of determination and findings that appeared in his local newspaper, and he certainly did not know he had a right to appeal them. That right expired 30 days after the notice appeared.

Brody and two other aggrieved New York property owners—William Minnich, who owns a custom woodwork business in East Harlem, and Pastor Fred Jenkins, who leads a Pentecostal congregation on Long Island—are fighting the outrageous New York procedure.

At a court hearing this past December, Judge Harold Baer announced he will decide within a few months whether or not to keep the bulldozers at bay while the merits of the property owners' case can be decided. The stakes could not be higher for Brody and Minnich and Jenkins, whose dreams of better lives will be leveled if the government's abuse of eminent domain is not restrained.

All these men want is a fair chance to defend their property and be notified of their rights before they lose them. Property owners should not be kept in the dark when it comes to their rights. That is something that not only Franz Kafka, but all of us, can appreciate.

FOR MORE INFORMATION...

Life, Liberty, Property. Throughout western history, property rights have been the key to liberty and prosperity. (*Commentary* magazine, March 1999, 5pp.)

Call 312/377-3000 and request document **#1200128**

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Politics

Ron Faucheux

Ron Faucheux is editor-in-chief of *Campaigns & Elections.*

First, Get the Terms Right

Terms like "negative ads," "soft money," and "push polls" have been so perverted they are now devoid of practical meaning.

Let's look at the common media usage of some topical terms, and compare that with the truth.

Negative advertising. In media parlance, negative ads are bad by definition. But in reality, negative ads can be good, or at least can be an acceptable form of political communication.

If Candidate A lies in a positive TV spot—saying, for example, that he or she was a Rhodes Scholar when that wasn't so—then Candidate B must use a negative ad to set the record straight. In this case, it was the positive ad that was false, and the negative ad that was honest.

Negativity shouldn't be the sole criteria to judge political ads. Truth, accuracy, and relevance should be the prime standards. In the context of political advertising, negative simply means anything that says something *against* an adversary. That's why it's so ridiculous when candidates swear off negative ads, as if they are inherently evil.

In a democracy, political combatants need to be able to point out why the other guys are wrong. After all, the Declaration of Independence was largely a sustained attack against King George. Thomas Jefferson and his colleagues knew that free and open debate required something other than a purely positive message.

Soft money. To the media, this term incorporates all improper and shady fundraising that is designed to skirt the law—including channeling campaign money through party committees, independent expenditures, and issue advocacy. Of course, that isn't the whole story.

Under the law, soft money is technically that funding given to a political party organization to be used for party-building efforts such as voter registration, education, and get-out-the-vote drives. It is not regulated as direct candidate funding because it does not go into the treasuries of candidate campaigns.

Soft money is often used by the media to include, but should be distinguished from, independent expenditures, which are legal political activities financed by individuals or groups that expressly advocate the election or defeat of a candidate but are not coordinated with any candidate's campaign

Soft money should also be differentiated from issue advocacy, which is a legal political activity financed by an individual or group that presents a point of view on an issue without expressly advocating the election or defeat of a candidate.

They are three separate and distinct practices, even though they are now often used interchangeably.

So when John McCain and Bill Bradley said last year they would not use soft money in their Presidential campaigns, they did not really say much. The law already prohibited them from doing so. The big question was, if they had won their respective party's nominations, would they have prevailed on state and local party organizations not to use any money that is not now regulated under federal law to even indirectly benefit their Presidential races?

If the Michigan Republican Party, for instance, calls voters on election day asking them to turn out for the GOP, even if the Presidential candidate's name isn't mentioned, won't the calls still serve his purpose?

Push polling. To the media, this means attack phone calls used in a campaign to disseminate lies about the opposition.

While there is no such thing as a push poll, there can be push questions in a poll. A push question is a legitimate way for survey researchers to measure anticipated public attitudes on events that have not yet occurred or to test messages that have not yet been aired.

Negativity shouldn't be the sole criteria to judge political ads. Truth, accuracy, and relevance should be the prime standards.

What is commonly called "push polling" is not really polling at all.

Polling means you're calling a representative sample of voters to get information from them for research purposes. So-called push polling means you're calling voters to get information to them for political purposes.

So, when the media—and now the candidates—use the term push polling, what they really mean is an advocacy phone call dishonestly disguised as a poll so that the voter does not know the true source of the call. But because the term is now so distorted, and is incorrectly used to cover so many things, it's difficult even to follow disputes involving the alleged use of the practice by a campaign.

We'll never end bad campaign practices if we can't define right from wrong.

FOR MORE INFORMATION...

Campaigns & Elections magazine is published 10 times a year by Congressional Quarterly Inc. A year's subscription is $49.95.

PHONE For more information, call **800-771-8252**.

WWW or visit the magazine's Web site at **http://www.campaignonline.com**.

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Privatization

Robin A. Johnson

Robin A. Johnson is director of the Privatization and Government Reform Center at the Reason Public Policy Institute.

States Expand Privatization of Social Services

During the 1990s, a quiet revolution occurred in the way social services are provided by state governments, and it continues into the new century. Across the United States, state government agencies are increasing their privatization of social services.

It has been generally assumed that social services are more difficult to privatize than other government functions, because defining and measuring performance is more challenging. Picking up garbage is easier to oversee and monitor than ensuring foster children are properly placed. But survey results and real-world experience demonstrate that innovative state officials are overcoming those challenges.

CONTRACTING FOR EXPERTISE

A 1997 Council of State Governments survey found that social service agencies were the state departments most likely to report increasing their use of privatization over time. More than 85 percent of the responding agencies reported they had increased privatization in the five years prior to the survey. Seventy-five percent of respondents indicated they planned to increase privatization in the next five years.

Child care is contracted out most often, with 15 states reporting privatized service delivery. Consultants, specialists, and independent living support services are privatized by 14 states, while food stamp issuance, domestic violence programs, emergency shelters, and refugee services are contracted by 12 states.

According to the survey, more than half (53 percent) of the state agencies privatized more than 15 percent of their functions. Among the states that privatized the most social services programs are Arkansas, Florida, Hawaii, Kentucky, Michigan, and Utah.

The force driving the trend towards more privatization is the lack of agency personnel and expertise. Over 57 percent of responding officials cited this as the major reason for increased use of privatization. Cost savings have been less of a factor because savings from privatized social services were relatively modest. Most officials (76 percent) who estimated cost savings said they saved less than 5 percent, and none reported savings of more than 15 percent. However, a majority of respondents reported they expect cost savings to take on greater importance in the future.

As agencies successfully privatize functions, elected officials see the benefits and become more comfortable with expanding privatization opportunities. A majority (57 percent) of agency officials surveyed expect that increased support by political leadership will lead to more privatization in the future.

Also important, the survey found that social service contractors are more likely than other private contractors to be carefully monitored. While 57 percent of states responding to the survey reported they do not have an overall, standardized process for monitoring contracts, 57 percent *do* have such a system in place for social services. Highly visible problems with some social services may have caused state officials to be more vigilant about monitoring outcomes.

FOSTER CARE PRIVATIZATION IN FLORIDA

A case study of a recently privatized social service illustrates the factors that are critical to the success of contracting initiatives. In 1998, Florida passed legislation facilitating a major reorganization of the Department of Children and Families (DCF) and mandating that foster children be placed in private care by 2003.

Governor Jeb Bush recently reported the agency is making progress toward achieving its goal of moving troubled children into the care of community groups. Bush stressed the state was seeking input from private care providers on how best to ensure success, adding "We don't want to give you (private providers) a manual."

The force driving the trend towards more privatization in social services is the lack of agency personnel and expertise. Cost savings have been less of a factor.

The state established ambitious goals for moving children into private, community-based care. Officials expect approximately 30 percent of the 15,000 children currently in the child welfare system to be transferred to private care in the next 10 months.

Florida officials are also carefully measuring the performance of privatized foster care. For example, the YMCA in Sarasota County has taken over child welfare services and reduced the time children stay in the foster care system before they are reunited with family from 24 months under DCF to less than 10 months. In addition, the number of months in foster care before adoption has been reduced from 45 months to less than 30 months.

Bush predicts the Florida foster care overhaul will become a model for other states. With its emphasis on empowering local agencies, establishing performance goals, and monitoring outcomes, the program offers a microcosm of the changes occurring in state-based social services across the nation.

FOR MORE INFORMATION...

Competition and Choice in NYC Social Services. Has the privatization of social services resulted in greater competition and choice? This study examines privatization in five different social services. (Baruch College, 1999)

Call 312/377-3000 and request documents **#6577411** (part 1, 18pp.) and **#6577412** (part 2, 17pp.)

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Regulation

Susan E. Dudley

Susan E. Dudley directs the Public Interest Comment and Regulatory Accounting projects of the Regulatory Studies Program of the Mercatus Center at George Mason University.

Midnight Regulations at All-Time High

A flurry of regulatory activity during President Clinton's final months in office generated an unprecedented volume of new rules and regulations with which American businesses, citizens, and state and local governments will have to comply.

According to Jay Cochran III, Ph.D., a research fellow at the Mercatus Center at George Mason University, this last-minute burst of regulatory activity is to be expected.

Using the number of pages published in the *Federal Register* since 1948 as a proxy for regulatory activity, Cochran found that the volume of regulations issued during the post-election quarter (defined as the full months of November, December, and January) averaged 17 percent higher than the volume of rules issued during that period in non-election years.

According to Cochran's research, the dramatic increase in regulatory output during the last three months of the Clinton administration is not surprising in its direction, though the magnitude of regulatory activity has set a new record.

In January 2001, President Clinton eclipsed President Carter's 20-year-old record for the most pages published in the *Federal Register* during the post-election quarter. President Clinton's post-election page count reached 26,542 pages (compared to 24,531 pages issued during President Carter's 1980-1981 post-election quarter).

The regulatory activity in Clinton's post-election quarter represented a 51 percent increase over the average number of pages published during the same quarter of the previous three years of Clinton's second term.

Of course, some of these so-called midnight regulations may have been developed carefully over many years, in a rulemaking process that just happened to have culminated during the final months of the administration. But certainly others were hurried into effect without the usual checks and balances, and may cater to special interests rather than the public interest.

Consider, for example, the Department of Energy's new standards mandating minimum energy efficiency for air conditioners, heat pumps, and washing machines. Unlike previous energy-efficiency standards, which have taken as long as 10 years to evaluate, develop, and issue, these standards hurtled through the regulatory process at lightning speed. The Department announced its proposal on October 4, accepted public comment until December 4, and, just two weeks later, circulated a final draft among other agencies in the administration. Over the objections of other administration officials, and contrary to many public comments, the rules were formally issued on the Clinton administration's last day.

Other midnight rules are expected to have a significant impact on American consumers and businesses, as well as state and local governments. These include EPA's diesel rule and new reporting requirements for lead under the Toxic Release Inventory; the Forest Service's ban on all roads in over 58 million acres of forest land; the Department of Health and Human Service's medical privacy standards; and OSHA's ergonomics program rule, among others.

A REVIEW POSSIBLE

In a memorandum dated January 20, 2001, Bush Chief of Staff Andrew Card directed all agencies to withdraw regulations sent to the *Federal Register* but not yet published. That memo also directed agency heads to "postpone the effective date of [recently issued but not yet effective] regulations for 60 days to ensure that the President's appointees have the opportunity to review any new or pending regulations."

Despite a delay in effective date, once a final regulation has been published in the *Federal Register*, the only unilateral way an administration can revise it is by initiating a new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; they must develop a factual record that supports the change in policy.

> *In January 2001, President Clinton eclipsed President Carter's 20-year-old record for the most pages published in the Federal Register during the post-election quarter.*

While the new administration's options for overturning final regulations are constrained, Congress can expeditiously disapprove recently issued rules under the power conferred by the Congressional Review Act (CRA). Although over 20,000 rules have been submitted to Congress under the CRA since it was enacted in 1996, not one has been disapproved. Largely, this is because any disapproval of a rule would likely have been vetoed by the President whose administration wrote it, thereby requiring a two-thirds majority to override.

The next few months, however, present a unique opportunity for applying the CRA. Under the CRA, all rules issued after July 13, 2000 may be subject to review and joint resolution of disapproval for 60 legislative session days. During this briefly open window, the veto threat is diminished, since any regulations subject to disapproval were issued by a President no longer in office.

FOR MORE INFORMATION...

The Cinderella Constraint. Read Jay Cochran's complete paper testing the anecdotal impression that regulations increase prior to new Presidential administrations. (Mercatus Center, October 2000, 17pp.)

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Taxes

Bill Ahern

Bill Ahern is communications director for the Tax Foundation.

The Effect of Progressive Tax Codes

Arguments over tax plans are really arguments about how "progressive" our tax system is. Our current federal income tax code has five rates: 15 percent, 28 percent, 31 percent, 36 percent, and 39.6 percent. This is a progressive structure, meaning the more you earn, the more you pay *as a percentage of your income.*

To evaluate whether a tax-cut plan makes the current code more or less progressive, the question to ask is similar: How would the plan change the percentage of income taken in taxes from each "income group," this year and in the future?

When the rates are left unchanged over several years, tax burdens rise by themselves because people earn more and find themselves paying higher rates. As a result, tax collections rise at a faster rate than taxpayers' income. So while the nation's income increased at a 6.2 percent clip over the past decade, income tax collections grew 7.9 percent.

Any nation with a progressive tax code, then, must enact periodic tax cuts unless it wants the government to collect and spend an ever-larger fraction of the people's income.

In addition to causing these "autopilot" tax increases, progressivity creates much of the tax code's complexity. Nevertheless, the income tax code has been progressive since its inception, and during last year's Presidential campaign both major party candidates proposed plans that would increase this progressivity.

PERCENTAGE OF INCOME VS. A PERCENTAGE OF THE TAX CUT

When a worker gets his annual raise, and people ask him what he got, they expect an answer like "3 percent" or "7 percent" or "10 percent." What those answers mean, of course, is the percentage change of the person's income—not the percentage of the total raises handed out by the company. When you earn interest on a deposit at the bank, you earn a percentage of the amount you have in the bank—not a percentage of the total interest paid out by the bank.

A tax cut is similar. Each taxpayer should measure the benefits of a tax-cut proposal as a percentage of his or her income, and researchers or reporters measuring the effect of the plan should examine its effect on each income class as a percentage of income—not as a percentage of the total tax cut.

The public is invariably surprised to learn that the top-earning 1 percent make 18 percent of the money and pay 34 percent of the income taxes. This large share of income earned and taxes paid by the top 1 percent is nothing new, but over the past 20 years both percentages have slowly, steadily increased. Any reform other than an across-the-board tax cut, such as lowering the ceiling on the income a household can earn and still be required to pay only the lowest tax rates, increases the income tax's progressivity.

OTHER FORMS OF INCOME

Two forms of taxes commonly thought to add to the progressivity of the tax code should be treated with particular caution.

Corporate taxes are collected by the government from corporations, but these taxes are ultimately paid by the corporations' shareholders, customers, and employees in the form of lower share value, higher prices, and lower wages.

Even if one assumed, as some economic studies do, that corporate taxes fall only on shareholders, it is false to claim that the corporate tax burden is paid only by the wealthy. The Federal Reserve reports that over 48 percent of Americans now own shares of stock.

Estate taxes are quite similar in this regard to corporate taxes. Like a corporation, an estate is a legal entity, not a tax-paying person.

> *Any reform other than an across-the-board tax cut increases the income tax's progressivity.*

The government collects money from the legal entity, which then distributes less money to the heirs than it otherwise would have. It is the heirs, not the deceased or the "estate," who pay the tax. Heirs belong to all income groups; estate taxes hurt those in the lowest as well as the highest income groups.

Even if one assumed that dead people could pay taxes, the notion that only the wealthy would benefit from ending estate taxes would be false. An elderly person with $1 million in assets might earn approximately $80,000 annually in interest and dividends. That wouldn't even put him in the top 10 percent of earners; yet upon his death he would have a taxable estate.

FOR MORE INFORMATION...

Indiana and a Progressive Tax Structure. How much income must you make to be assessed the highest tax rate in states with a progressive income tax? Less than you think. (*Indiana Policy Review*, Autumn 1999, 4pp.)

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Technology

Bartlett D. Cleland

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Privacy 101

"Those who can't do, teach" . . . or so goes the popular saying. In the increasingly controversial area of privacy policy-making, a similar dynamic seems to be underway: something like, "those who don't understand the issues, make the rules."

Information privacy has become one of the most contentious controversies of the information age, with debates raging on Capitol Hill, inside the Beltway, in state assemblies, and across the Web. It is likely Congress will take some legislative action this session on information privacy. Since some of the basic elements of the privacy issue are far from clearly understood or communicated, the debate will probably generate more heat than light.

GIFT GIVING

There are many facets to the privacy debate, with several complex, closely related issues involved. A simple analogy to gift giving will illustrate this point: You wrap a gift, and presumably it stays wrapped until it's time for the intended recipient to open the gift.

While electronic databases and e-commerce have heightened awareness of what companies know about their customers and what they do with that information, the practice of information-gathering and targeting services based on that information is nothing new.

What, you ask, is the privacy concern involved?

Is it that only the intended recipient should open the gift and see the contents? Or that the gift should not be opened early? Or that the gift will in fact be in its box on the day you intend it to be opened?

No, these are all security issues.

The only real privacy interest in the entire gift-giving transaction is that the information provided on the gift tag's "to" and "from" lines are the only things the gift tag reveals about you to others.

If you can grasp this example, you are well ahead of most participants in the "privacy" debate today. Most routinely conflate security issues—that is, the safety of the items stored online or on your computer—with privacy issues.

When a hacker attacks a Web page and grabs its contents—which may include your personal data—what has occurred is a security breach, and not a privacy violation.

EFFECT ON CUSTOMER SERVICE

Aside from the fact that many policymakers misunderstand important concepts in the debate, another area of concern is that policymakers may not appreciate how privacy legislation will negatively affect customer service.

While electronic databases and e-commerce have heightened awareness of what companies know about their customers and what they do with that information, the practice of information-gathering and targeting services based on that information is nothing new.

Take, for example, the general goods stores of 100 years ago, or even the clothing stores of today. Would a customer take offense if a thoughtful salesperson remembered her name from a previous visit and greeted her accordingly? What if that same salesperson went out of his way to "set back" some of the customer's favorite product, so she could pick it up the next time she visited? A customer treated that way might even reveal more personal information about herself—a phone number, perhaps—so that when a limited shipment arrived she could be notified.

In none of these scenarios is the customer likely to perceive the salesperson as acting odd or intrusive. In fact, she would be more likely to characterize him as helpful, providing "true customer service" like the "good old days."

There is one policy a business should adopt, of course. That is to put in place, voluntarily, guidelines for how customer information will be treated. The business should explain to customers what its practices are, and it should follow those practices to the letter. Armed with knowledge of the business's information policy, the customer may then make an informed decision about the cost and benefits of engaging in commerce with that business.

The decisions that will be made in the states, on Capitol Hill, and in the White House in the next year or two will have a profound impact on our individual privacy. Understanding the issues and how they affect everyday life is critical if individuals are to remain in charge of their own lives, rather than turning over every-day decisions to the government.

FOR MORE INFORMATION...

Is Internet Privacy Overrated? Good business use of customer information reduces costs and waste, and improves customer service. (*Liberty*, August 1999, 2pp.)

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Single-Payer Health Care: The Next Battleground

Paul Guppy

When Hillary Clinton's effort to force all Americans into government-run health care failed at the national level, advocates decided to advance their agenda in selected states instead. Washington has the unfortunate distinction of being one of them.

Initiative 245 seeks to make our state government the "single-payer" financer in one, all-inclusive health care system. In the process, more than five million Washingtonians would lose their existing health care and be forced into the state program. Single-payer advocates are now gathering signatures to place the proposal on the 2001 ballot. They have until July 7 to do it.

The first two questions people generally ask about government-run health care are, "How much will it cost?" and "Who will pay for it?" The Washington Institute Foundation has just completed a study, "Assessing the Cost of Single-Payer Health Care," that analyzes Initiative 245's potential financial impact on employers and on individuals. Our findings are summarized here; the full study is available at http://www.wips.org.

Initiative 245 seeks to make Washington state government the "single-payer" financer in one, all-inclusive health care system. In the process, more than five million Washingtonians would lose their existing health care.

NEW ENTITLEMENT MEANS NEW TAXES

If enacted, the program would add 34 new sections to the state code and would cost at least $10 billion a year, funded mostly through a new payroll tax. To put that figure in perspective, consider that $10 billion is already about what our state spends through its General Fund budget: The proposed health care plan would roughly double our discretionary spending. Since the tax is a graduated one, based on number of employees, the cost would fall heaviest on large employers and workers who already have full, employer-paid health coverage.

Washington has more than 165,000 businesses, employing over 2.5 million people. Those businesses range in size from a single entrepreneur with an assistant, to international companies mustering workers in the tens of thousands. The tax charged per employee would be based on the size of the firm, as shown in the table at right.

Number of Employees	Percent of Gross Payroll Paid in Tax
0 - 19	6.0%
20 - 49	7.5%
50 - 499	9.75%
500 - 999	11.5%
1000 or more	12.0%

PENALTY ON ECONOMIC GROWTH

The heavier burden placed on larger businesses is founded on the mistaken reasoning that they have a greater ability to pay. In fact, a larger company may have no more ability to pay per employee than a smaller firm.

For companies with 19, 49, 499, or 999 workers, the marginal cost of adding one more employee would be severe. Consider a firm with 19 workers, each earning the average manufacturing wage of about $31,000. Adding just one worker would push the tax this firm pays for all workers up from 6 percent to 7.5 percent, increasing its health care tax by $11,160. That amounts to a whopping 36 percent tax on the salary of the 20th employee, creating a strong reason for not hiring that person in the first place.

ENDING PRIVATE HEALTH INSURANCE

Private health insurance would not be outlawed, but paying for the government plan would be mandatory—and very few companies or individuals would be willing to pay for both. As single-payer supporters put it, once their plan is enacted "there won't be much of a market for private insurance in Washington."

ENDING COMPANY SELF-INSURANCE PLANS

Single-payer health care means more than just putting insurance companies out of business. About half of all large companies in Washington self-insure. Boeing, for example, provides its own coverage for 86,000 employees, plus their dependents. Enactment of Initiative 245 would mean the end of these company-financed plans because no firm, even the largest, could afford to pay 12 percent of payroll to the state while maintaining its own health care plan for workers.

MANY EMPLOYERS EXEMPT

Non-business employers would be entirely exempt from the health care payroll tax. The initiative says the tax applies to "any . . . entity operating a business in Washington state." That definition excludes thousands of entities that are not businesses, including nonprofit charities and government agencies. Those workers would be fully eligible for benefits, but their employers would not pay into the system. Instead, their health costs would be subsidized by the private, for-profit sector.

For most people in Washington, then, a single-payer system is hardly an attractive deal. It would be expensive and wasteful, and would not offer more cost-effective coverage than what most of us already have.

Paul Guppy is vice president for research for The Washington Institute Foundation, a nonprofit research and education organization based in Seattle. *The group's analysis of Initiative 245 was funded by a grant from the M.J. Murdock Charitable Trust.*

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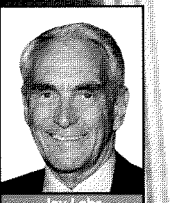
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Privacy and the First Amendment

Eugene Volokh

Eugene Volokh is professor of law at UCLA School of Law. The following excerpt is taken from the Communications of the ACM *(Association for Computing Machinery), August 2000. A longer version was published in* The Future of Financial Privacy *by the Competitive Enterprise Institute, 1001 Connecticut Avenue NW, Washington DC 20036. An even longer version, originally published in the* Stanford Law Review, *is available at http://www.law.ucla.edu/faculty/volokh/privacy.htm.*

People constantly learn information about us: They see what we do, what we buy, and what we look at. If they know who we are, they can record this information under our name. If we engage in computerized transactions with them, such recording becomes very easy, as does combining this information with still other information that is tied to our names. If the transactions are personalized—if we voluntarily turn over information about ourselves that facilitates our business arrangement—then they will have even more information to record. And once they've recorded this information, they can sell it to others.

A lot of people don't like this. To be more specific, a lot of people don't like to have others learn information about themselves; they are usually quite happy to learn information about others, and sometimes resent it when legal barriers block them from learning such information. Nonetheless, many believe we should have a legal right to "control information about ourselves."

CURRENT LAW

Do we currently have such a legal right? The answer, as is usual in the law, is "sometimes."

First, the law protects our physical privacy in a variety of ways. The Fourth Amendment limits the government's power to search us, our homes, and our papers. Trespass law imposes even broader limits on the power of private parties to break into our homes and go through our papers. Computer trespass laws generally bar people from accessing our computers without our authorization.

All these may properly be called "privacy" rules, but they limit only others' ability to learn things about us by accessing our property. They do not limit others' ability to *communicate* things they have lawfully learned about us.

Second, the Supreme Court has suggested the Bill of Rights may prevent the government from revealing certain potentially embarrassing information that it might have about us; our medical histories, for example. This is closer to a right to information privacy, but it is limited in a critical way: Like virtually all other constitutional rights, it applies only to the government's actions. Whatever rights we might have against our business partners, none of these rights flows from the Constitution.

Third, a few laws genuinely do aim to stop certain private parties from disclosing certain information about people. Federal laws bar cable companies and video stores from disclosing information about customers' viewing habits. State professional-licensing laws bar lawyers, doctors, and other professionals from revealing certain confidential information learned from the relationship. These laws, though, apply to only a narrow range of revelations; none of them stops a business (either an e-business or a bricks-and-mortar business) from revealing which kinds of food, shoes, or books you bought from it.

CONTRACTS PROTECT INFORMATION PRIVACY

People's search for legal protection of their information privacy cannot rely on some currently existing, broad "right to privacy"; American law just does not recognize such a thing. On the other hand, information privacy does get considerable protection from a source that to some is unexpected—the law of *contract.*

Contracts are tools for you and your business partners to make your own law for your own transactions. If you have a great new product idea and you tell it to me, there'd be nothing illegal in my revealing it to the whole world, even if you would lose a lot of money as a result. But if I promise to keep it secret, then my revelation becomes a breach of contract and opens me up to a damages lawsuit. By our contract, we have given you a right to insist that I keep certain information private.

Likewise, a customer and a seller can create a sort of right of privacy, if the seller promises not to communicate data about the customer, or promises to communicate it only under certain conditions. In a hotly competitive economy many companies would be happy to attract more customers by promising privacy. And such a privacy contract doesn't require any special formalities, like a signature on paper; if a business says "We promise to keep your data private," and people act in reliance on that promise, that promise becomes a binding contract.

Of course, some businesses may breach their contracts, but the law offers significant remedies. Customers can file a lawsuit, and can often ask the Federal Trade Commission (FTC) or other regulatory bodies to take action on their behalf. Moreover, the scandal created by a lawsuit can cause businesses more loss than the lawsuit itself would.

EXPANDING INFORMATION PRIVACY LAW

So that's what the law is today; but what should it be?

To begin with, legislators could strengthen the protections offered by contract law. Most importantly, they can define default privacy-protection rules; for instance, they can say that sellers of medical supplies implicitly promise not to reveal information about their customers, unless they explicitly and prominently disclaim this default provision.

Congress could impose mandatory information-privacy rules that go beyond what parties explicitly or implicitly promised. To take an extreme example, Congress might bar any person from communicating any information about another's purchases or other transactions without the subject's permission.

Is it permissible, however, for Congress to do this? After all, there's another term for "barring any person from communicating any information about . . ."—and that's a speech restriction.

This is clearest if we start with one application of this hypothetical law: a newspaper reporting that someone—a politician or celebrity, perhaps—was seen buying some product or engaging in some transaction. The newspaper

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is communicating information about another's commercial transaction, and it's doing so for money. But stopping the newspaper from publishing such stories raises First Amendment problems.

To begin with, it's pretty clear that such sweeping information-privacy rules can't be justified on the grounds that "they don't restrict speech, they restrict only the sale of information." Speech often *is* the sale of information—consider *The Wall Street Journal* or *Encyclopedia Britannica*, the contents of which are fully constitutionally protected against government suppression.

Nor can information-privacy speech restrictions be defended on the grounds they merely create a "property right in personal facts." Under current intellectual-property and free-speech law, facts about people are owned neither by the subject nor by their gatherer; they are "free as the air to the common use." And that's a good thing—suppression of facts, whether done in the name of intellectual property or otherwise, is a troubling matter.

But isn't information about people's transactions of relatively low constitutional value? Isn't it something that's really not of legitimate public interest? After all, "Volokh bought a lawnmower" isn't "We hold these truths to be self-evident." It isn't commentary on political issues, or debate about high philosophy. Shouldn't we balance the rather modest constitutional value of this speech against the important interests supporting suppression of this speech?

This is a powerful point—but before we urge the legal system to accept it, we should think about all its implications. This, after all, is exactly the argument made in favor of the Communications Decency Act (CDA), which the Supreme Court struck down in 1997. Sexually themed speech (whether you call it "pornography" or "art"), the CDA's proponents argued, isn't really that constitutionally valuable, and the right to communicate such speech had to be balanced against the government's interests.

Similar arguments were made for a ban on flag-burning, which the court also struck down. Although it is politically themed, it's hardly of the highest constitutional value. If such expression were excluded from public discourse, the Republic wouldn't fall. Plenty of people have urged that the right to engage in such speech should be restricted.

If the Court were to accept the notion that personal information is of "low constitutional value," this would provide powerful precedent for further restrictions on other categories of speech which some (including some Justices) are prepared to call "low value." Conversely, if we think even pornography, profanity, and nonrational vituperation are speech, and as such deserve protection under the free-speech clause, we might ask why the same wouldn't apply to accurate speech about our neighbors' behavior, habits, and purchases.

People's search for legal protection of their information privacy cannot rely on some currently existing, broad "right to privacy"; American law just does not recognize such a thing. On the other hand, information privacy does get considerable protection from a source that to some is unexpected—the law of contract.

THE VALUE OF INFORMATION

Information about what others are doing often can be of significant value. Sometimes, it can even be of political relevance—when it discusses the behavior of political figures, for example. In Europe, where the government generally has more power to restrict speech than it does in the United States, there is already talk about forbidding journalists from publishing supposedly "private" information about public officials' sexual affairs. I wouldn't care about such facts in deciding whether to vote for someone, but other voters might, and in a democracy the media shouldn't be gagged from informing them about it.

At other times, information about people can be valuable to us in our daily lives. Consider when someone—in the media or not—reveals that one of our acquaintances has a criminal record, or a bad credit history. Should we trust that acquaintance in business? Should we trust him to watch our children? We can't decide unless we're informed. Why should government have the power to ban people from speaking this information?

The experience of the private-facts tort is illustrative. Several cases have actually held that newspapers can be punished for revealing people's criminal pasts, even if the revelations are entirely accurate.

For instance, in one case a court held that a publication could be held liable for running a story that revealed that a particular person had committed an armed robbery 11 years before. Naming the criminal, the court said, served no "public purpose" and was not "of legitimate public interest." The person was "rehabilitated" and had "paid his debt to society." "[W]e, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime" by revealing his past.

But appealing as the court's rhetoric might sound, there's considerable danger in the government deciding which speech is of "legitimate public interest" and which isn't, or which things "right-thinking members of society" would want to know and which only the wrong-thinking ones would care about. Maybe we shouldn't assume that someone who committed armed robbery 11 years before might still be dangerous. Maybe we ought to forgive and forget. But in a free society, we are entitled to decide this for ourselves.

And if we, and not the government, should be the ones who decide what is said and what is listened to about people's criminal records, perhaps the same should apply to other speech.

Perhaps certain kinds of speech—speech about someone's food or clothing purchases, for instance—aren't of legitimate interest. But freedom-of-speech principles should be understood as leaving it to speakers and listeners to decide what information they should find interesting, and as denying the legal system the power to make this decision for us.

UNINTENDED CONSEQUENCES

More importantly, even if a narrow restriction on speech about a person's innocent shopping habits might do more good than harm, the danger with accepting any legally enforced system of control over factual information is that it may eventually go far beyond its roots.

Accepting the notion that certain facts may be suppressed because they are of "low value" or because they lack "legitimate public interest" creates a precedent in favor of broader suppression of other speech determined to be of "low value."

One can argue that courts should carve out a new First Amendment exception to justify such restrictions, and perhaps the courts will be sympathetic to such arguments. But there are costs to such new exceptions.

In a legal and political system built on precedent and analogy, one speech restriction can easily lead to other, broader ones. Relying on admittedly imperfect contractual protections may ultimately prove to be the safer bet.

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Why We Have a Water Crisis

Harry Messenheimer, Ph.D.

As New Mexico's economy and population have grown, media and policymakers have shown increased interest in water allocation. That interest has further intensified because of last summer's drought. What to do about the scarcity of our "precious" water?

Although scarcity is characteristic of all goods, few other goods draw as much attention as water. When it comes to water, some western states have a "crisis." Water is being used faster than it is being replenished. We are urged to solve our crisis by improved planning. An expanded public forum would accomplish that planning, according to the various proposals being floated. The planners would decide who gets water for what uses and how to conserve it.

That we don't need such planning for other goods seems obvious. There is no crisis in pencils, or personal computers, or televisions, or gasoline. So, what is it that is so different about water? To answer that question, let's compare water to another good, oil.

OIL AND WATER

Oil is scarce, but we don't have an oil crisis (as least not since the government got out of the business of trying to regulate oil by means of price and import/export controls). Notice also that states with a relatively greater natural scarcity of oil than New Mexico, such as Colorado, don't have an oil crisis.

The reason we don't have an oil crisis is that well-defined, tradable property rights exist. When such property rights exist, the market for oil resolves conflicts over the uses of oil—whether those be current uses, such as transportation or heating, or future use (current conservation). The owners of oil have an incentive to be good stewards of their resource, because if they are not, they are the losers. The price of oil determines who purchases it for what purposes.

There is no crisis in pencils, or personal computers, or televisions, or gasoline. So, what is it that is so different about water? The absence of well-defined and enforceable property rights.

Since oil has a price, it tends to be allocated to its highest-valued use as determined only by the users themselves as they value it (personally and individually) for its alternative uses. Anticipation of the future price of oil ensures that it will not all be used up in current consumption. There is no crisis in oil today, and there will be no crisis tomorrow.

Now contrast oil and water. The reason we have a crisis in water is the absence of well-defined and enforceable property rights in water. In New Mexico, who has the right to what water is determined in a bewildering process by the State Engineer in conjunction with competing political interests. Interstate compacts and international treaties complicate that process . . . which clearly is not working.

The type of expanded planning operation being proposed cannot solve the water crisis, because the incentives are all wrong.

PROPERTY RIGHTS IN WATER

Only after property rights in water are established will the crisis evaporate. Only then will prices ensure that water flows to its highest-valued uses, whatever those uses may be (recreational, habitat, drinking, agriculture, industrial, new development). Only then will water flow unimpeded by dams of coercion or the politics of special interest. Only then will water flow from where it is relatively less scarce to New Mexico. Only then will individuals have an incentive to conserve, catch, or recycle water.

In order to establish property rights in water, two factors must be addressed: water sources, and water quality.

The quantity of water available from one source (above-ground streams and lakes) may affect the quantity available from another (underground aquifers), and, by extension, the value of property rights in a given body of water.

The value of water is also affected by pollution, and thus some form of compensation—perhaps in a market for the right to pollute, which would make explicit the cost of pollution—should be encouraged.

Property rights and trade in water is not just theory; it works in practice. Water marketing has really matured in the past several years, particularly in the Northwest. The Oregon Water Trust and Washington Water Trust are full-fledged nonprofit organizations that have done hundreds of water purchases and leases to benefit fish and wildlife.

Terry Anderson and Pamela Snyder explore the issues in some detail in their 1997 book, *Water Markets: Priming the Invisible Pump.* They cite additional empirical evidence concerning the success of property rights in water, and point the way to a means of allocating water—markets—that is more efficient and effective than command-and-control planning.

Harry Messenheimer is the executive director of the Rio Grande Foundation, an independent, nonpartisan, research and educational organization dedicated to the study of public policy and promoting economic freedom in New Mexico. It is based in Albuquerque.

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